

7 Official Opinions of the Compliance Board 95 (2011)

Exception – Legal Advice – Outside Exception – Discussion of enforcement terms of special exception was distinct from pending litigation on the grant of the special exception.

Minutes – Preparation following all meetings, required.

March 10, 2011

Complainant:

Donald J. Barnes

Linda J. Barnes

Respondent:

Poolesville Board of Zoning Appeals

The Open Meetings Compliance Board has considered your complaint that the Poolesville Board of Zoning Appeals violated the Open Meetings Act in connection with a closed session held on February 25, 2010. For the reasons explained below, we find that the Appeals Board violated the Act by failing to create minutes of the open and closed sessions and to disclose a summary of the actions taken at the closed session. We further find that the Appeals Board violated the Act during the closed session by conducting business that did not pertain solely to pending or potential litigation against the Town.

I

Complaint and Response

According to your complaint, on February 25, 2010, the Poolesville Board of Zoning Appeals conducted a closed session in violation of the Open Meetings Act. You attached a copy of an agenda for the February 25 meeting that noted there would be a closed session following a public hearing on an unrelated matter. That agenda, posted on February 23, 2010, stated that the Appeals Board would hold the closed session under §“10-508(a)(8) to consult with counsel regarding complaints on an approved special exception.”¹ Other attachments to your complaint indicate that you had filed two such complaints with the Appeals Board about two weeks earlier. In those complaints, you stated to the Appeals Board that Doctors Mevissen and McInnes (“the doctors”) were using their home as a professional office in violation of the conditions placed on the special exception granted to them for that use. You

¹ All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

allege that your “interest [was] raised” by the Appeal Board’s agenda for the February 25 meeting and that you attended the meeting “hop[ing]...to learn more.”

You state that you “learned little more at the [Appeals] Board meeting.” You allege that the Appeals Board failed to adequately announce the purpose of the closed session, take a vote to close the session, or record the vote. The audience was simply asked to leave Town Hall; as a result, you allege, the public was denied the opportunity to object. You also allege that the Appeals Board failed to properly document the closed session discussions. You attach an Appeals Board document concerning the February 25, 2010 meeting; that document is labeled “Summary of meeting due to recording malfunction.” You state that the document did not mention the closed session or contain information required under §§10-508(d)(2) and 10-509(c)(2).

You further allege that you learned the purpose of the closed session only when you received a copy of a March 16, 2010 letter from the Appeals Board chair to the doctors about their operation of a professional office in their home as a special exception use. That letter referred to two complaints about the doctors’ activities and stated: “The Board met to discuss this matter on February 25, 2010.” Your two complaints were attached. The Appeals Board then stated the action it took:

Without any further input from any parties, the consensus of the Board was that the allegations, if true, do not represent a serious violation of the conditions of the special exception, and that a hearing to consider further action is not warranted at this point. However, the Board members felt that, due to the complaints, you should be reminded of the conditions of the special exception and the intent of the Board that they be strictly observed.

The Board wishes to make clear that it has not made any findings or reached any conclusions with regard to the truth of the complaints received.

You state that the Appeals Board’s approval of the doctors’ special exception use was then being litigated in a case pending in the Court of Special Appeals. You assert that the validity of the approval of the special exception was an issue distinct from the issue of whether the doctors were violating the conditions incorporated into the approval. In your view, the closed session should have been open to the public because the discussion of your complaints did “not rise to the level of Section 10-508(a)(8).”

Jack A. Gullo, Jr., appointed as the attorney for the Town in May 2010, submitted a timely response on behalf of the Appeals Board. According to the response, rather than designating someone to take notes, the standard practice of the Town's boards and commissions is to record their meetings and use the recordings to produce a transcript of each meeting. However, "when this technology does not work properly, there is an incomplete record of what transpires...." The response states that the recording equipment malfunctioned on the night in question.²

The Appeals Board disputes that it failed to adequately announce the purpose of the closed session. The agenda statement included with the complaint reflected the statutory authority and included a brief summary of the subject to be discussed. The Appeals Board also disputes the allegation that a vote was not taken to close the meeting. Although an audio record was not preserved, the chair of the Appeals Board apparently reported to Mr. Gullo that it is "her custom and practice to always call for such a vote" and that she believes that a vote was taken in this case. The Town has acknowledged that "the lack of a record ... is unacceptable and the Town will need to ensure strict compliance with such basic requirements of the Act in the future." As to the suggestion that the public was denied the opportunity to object to the closure, the response argues that the Act does not require a public body to ask whether there is any objection.

The response acknowledges that the allegations as to a lack of documentation required in connection with a closed session is "partially correct." According to the chair of the Appeals Board, she read the statement that appeared on the agenda. Thus, in Mr. Gullo's view, there was compliance with §10-508(d)(2)(ii). However, the response acknowledges noncompliance with §10-509. According to the response, "it is obvious from the letter ... sen[t] to Drs. Mevissen and McInnes that the issue surrounding the special exceptions and potential violations thereto were discussed and a decision was reached as to a course of action ... Unfortunately, without a written record of what occurred, ... it is impossible to determine the scope of the closed meeting discussion."

As to the justification for a closed session, the response explained that the complainants and the Town were parties to pending appellate litigation that

² We note that although the response refers to the "February 10, 2010" meeting, the response otherwise addresses the complainants' allegations about the February 25, 2010 meeting, and the Appeals Board's documents confirm the February 25 date. We shall therefore assume that the respondent meant February 25, not February 10.

arose out of an Appeals Board proceeding. At the time of the meeting, the appeal before the Court of Special Appeals was pending, and the purpose of the closed session was to discuss current complaints by the complainants regarding potential violations pertaining to the decision that was the subject of that appeal. The Appeals Board believed it needed legal advice regarding any action it might take and the impact on the pending appeal. Accordingly, Alan Wright, the Town's former municipal attorney, was present to answer any questions that the Appeals Board might have had and offer advice for a proper course of action in dealing with the zoning complaints. Because the advice of counsel was privileged, the Appeals Board's position is that this aspect of the complaint is without merit.

In closing, the response explained various measures being implemented to ensure future compliance.

II

Analysis

When a public body closes a meeting governed by the Act, certain procedures must be followed. If it is anticipated that all or a part of the meeting will be closed, the notice is to inform the public of this fact. §10-506(b)(3). The tentative agenda posted by the Appeals Board, which apparently served as public notice of the meeting, clearly satisfied this requirement. Furthermore, immediately before the start of a closed session, the Act requires that the public body conduct a vote to support closure of a meeting. §10-508(d)(1) and (2)(i). According to the chair of the Appeals Board, a vote was conducted. However, as the response acknowledged, the failure to document the vote violated the Act. There apparently is no record of the Appeals Board's vote to close the meeting on February 25, 2010.

The Act also requires that, before the start of a closed session, the presiding officer of a public body is to "make a written statement of the reason for closing the meeting, including a citation of the authority under [§10-508], and a listing of the topics to be discussed." §10-508(d)(2)(ii). As long as the statement is available at the time the meeting is closed, there is no reason that the written statement cannot be prepared in advance of the meeting. Provided the statement accurately reflects the statutory requirements at the time a meeting is closed, there is no reason this statement could not be printed as part of an agenda. 4 *OMCB Opinions* 46 (2004). In our view, the statement included in the agenda satisfied the Act. Furthermore, the response indicated that the chair actually read the statement that had been printed on the agenda – a practice we commend. Because the vote was conducted before the closed

session and the written statement was obviously available at the time the session was closed, we agree with the municipal attorney that the allegation that the public was denied an opportunity to object to the closure lacks merit.

We find that the Appeals Board violated the Act by failing to create sufficient minutes of the February 25 meeting. Although minutes normally are not in the form of a transcript, had the equipment worked properly and a transcript been produced, the information therein would likely have satisfied the requirement for minutes of the meeting. 1 *OMCB Opinions* 162, 165 (1996). Although a “[s]ummary” of the meeting was produced, the fact that the document failed to make any mention of the closed session clearly shows that the document did not satisfy §10-509. Nor is there any public record of the closed session as required by §10-509(c)(2). Given the recorder “malfunction,” in our view, the Appeals Board ought to have at least attempted to create minutes based on the participants’ collective memory that reflected the minimal information that must be documented under provisions of the Act. We acknowledge that the practices being implemented by the Town’s boards and commissions, as outlined in the response, should prevent a repeat of those deficiencies.

In closing the session, the Appeals Board relied on §10-508(a)(8), which authorizes a public body to go into closed session for the purpose of “consult[ing] with staff, consultants, or other individuals about pending or potential litigation.” We accept the Appeals Board’s explanation that it wished to discuss the recent complaints with counsel given the related appeal pending before the Court of Special Appeals. Furthermore, the Open Meetings Act does not preclude a public body from acting on a matter that is properly before it in closed session. *See, e.g.*, §10-509(c)(2)(iv) (publicly-available minutes prepared subsequent to closed session to reflect, among other information, “each action taken during [closed] session.”). Of course, like any exception under the Act justifying a closed session, §10-508(a)(8) must be “strictly construed” and the Appeals Board was not permitted to discuss or act on any matter not permissible under the cited exemption. §10-508(b) and (c).

Unfortunately, the lack of any meaningful record limits our ability to assess whether the content of the letter addressed to the doctors about their current conduct was tied to the Appeals Board’s discussion with its former counsel concerning the litigation pertaining to the grant of the special exception. The Appeals Board’s March 16 letter, however, provides us with some basis upon which to evaluate whether or not the entire closed session might be fairly considered within the perimeters of §10-508(a)(8). *See* §10-502.5(f)(2). That letter shows that the Appeals Board both considered the question whether your allegations about the doctors’ activities “represent[ed] a serious violation of

the terms of the special exception” (an issue separate from the issue of the Appeals Board’s consideration of facts in the doctors’ application for the special exception) and reached a decision on its course of action. The Appeals Board’s consideration of the facts in your two complaints may have been informed by advice of counsel on potential litigation, but §10-508(a)(8) did not provide the Appeals Board grounds for denying the public access to its deliberations and vote. *See 6 OMBC 127*(stating, “once advice by an attorney has been provided, a public body must return to open session to discuss policy implications of the advice it had received”).

III

Conclusion

We find that the Poolesville Board of Zoning Appeals did not violate the Open Meetings Act in closing the meeting on February 25, 2010, with respect to the required vote and production of a written statement explaining the justification of closure. Furthermore, we find no merit to the suggestion that a member of the public was precluded from objecting to the closure. However, the Appeals Board did violate the Act in its failure to produce minutes of the open and closed sessions and the failure to disclose as part of publicly-available minutes information related to the closed session as required by the Act subsequent to the closed session. We further conclude that the Appeals Board violated the Act by discussing in closed session matters beyond the scope of the exception claimed by the Board as grounds for the closing.

OPEN MEETINGS COMPLIANCE BOARD

Elizabeth L. Nilson, Esquire
Courtney J. McKeldin
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